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No. 87-803

In the Supreme Court of the United States

OCTOBER TERM, 1987

JOSEPH HOUGHTON AND DONNA HOUGHTON, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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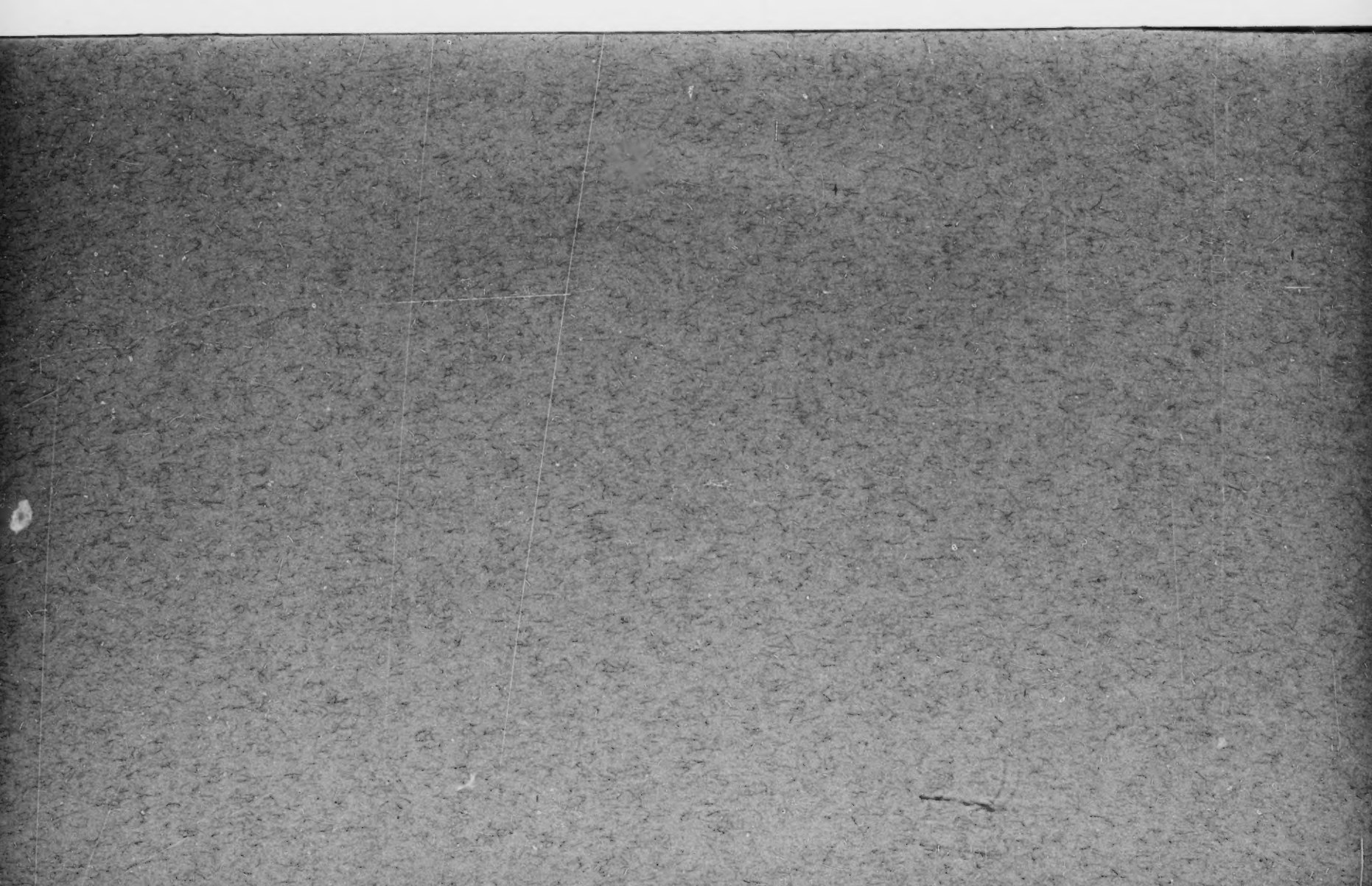

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Petitioners contend that the indictment in their case was insufficiently specific to meet the Fifth Amendment requirement of grand jury accusation.

1. Following a jury trial in the United States District Court for the Eastern District of Pennsylvania, petitioner Joseph Houghton was convicted on 26 counts of mail fraud, in violation of 18 U.S.C. 1341 (Counts 1, 2, 4-7, 9-11, 16-19, 23-28, 32, 33, 35-37, 41, and 43), and one count of interstate transportation of a security taken by fraud, in violation of 18 U.S.C. 2314 (Count 45) (C.A. App. A45). Petitioner Donna Houghton, his wife, was convicted on 13 counts of mail fraud, in violation of 18 U.S.C. 1341 (Counts 5, 6, 18, 23, 27, 28, 32, 33, 35-37, 41, and 43), and one count of interstate transportation of a security taken by fraud, in violation of 18 U.S.C. 2314 (Count 45) (C.A. App. A46). Petitioner Joseph Houghton was sentenced to a total of eight years in prison and five years' probation, fined a total of $27,000 ($1,000 for each conviction), and ordered to make restitution of $1,126,873

(*id.* at A45). Petitioner Donna Houghton was placed on probation for five years, fined $14,000, and made jointly responsible for the restitution of $1,126,873 (*id.* at A46). The court of appeals affirmed (Pet. App. 11a-13a).

The evidence at trial, the sufficiency of which is not in dispute, showed that petitioners participated over a period of almost ten years in a scheme centering on the submission of numerous fraudulent claims of loss to insurance companies. Beginning on a relatively small scale in 1975, the scheme involved false claims for luggage losses allegedly incurred in thefts from rented automobiles (C.A. App. A1275, A1370, A1388), false claims for jewelry losses from hotel-room thefts (*id.* at A1278), false claims for reimbursement for certain services never actually performed (*id.* at A1285-A1286, A1292-A1298), and numerous false claims based on automobile accidents, at least some of which were staged. By 1985, when the scheme came to an end, it had earned petitioners more than $1 million (*id.* at A1372-A1373; Supp. C.A. App. 177A). The proceeds of the scheme went toward the purchase of several houses, numerous luxury automobiles, and jewelry (Supp. C.A. App. 91A, 413A).

The superseding indictment, in describing the ten-year scheme, alleged that petitioners staged and fabricated accidents, losses, and injuries and that, in connection with claims to insurance companies, they fraudulently described the facts surrounding their "accidents," the injuries suffered, and their insurance coverage (see Pet. App. 4a-8a). In addition to one witness-tampering charge (Count 46), the indictment charged 43 particular mailings (identified by date, sender, and recipient) and the interstate transportation of two insurance company checks (identified by date, origination, destination, drawer, and drawee) that petitioners caused as part of their overall scheme to defraud insurance companies (C.A. App. A59-A104).

Following the indictment, the government filed three bills of particulars (C.A. App. A107-A124). The bills of particulars detailed the dates and places of the particular accidents that were the subjects of the insurance claims involved in the mailings and checks. They also specified which of the several types of fraud that were alleged in the indictment (*e.g.*, staging of the incident, lying about injuries) the government would rely on at trial.

At trial, although the government put on evidence of numerous incidents that made up the larger scheme, the fraudulent mailings and checks all related to six incidents: a January 28, 1978, automobile accident in Malvern, Pennsylvania, involving vehicles driven by co-defendants Linda Livoy and Mary Houghton; a September 22, 1978, automobile accident in Norristown, Pennsylvania, involving an automobile driven by petitioner Joseph Houghton and a truck driven by government witness Joseph Albeser; a February 28, 1980, incident in Springfield, Pennsylvania, involving an automobile driven by petitioner Joseph Houghton; a July 7, 1980, incident in Florida involving an automobile driven by co-defendant John Cassidy; a January 17, 1981, incident in Pennsylvania involving an automobile operated by co-defendant Frank Livoy; and a January 3, 1982, incident in Lower Merion Township, Pennsylvania, involving an automobile operated by co-defendant Nancy Cohan. The jury was instructed that, to convict petitioners on any count, it must find that the particular insurance claim associated with the mailing or check at issue in that count arose out of one of those six incidents (C.A. App. A4574, A4582).

Petitioners appealed their convictions, contending, among other things, that the proof at trial showed numerous separate fraudulent incidents, none of which was described in sufficient detail in the indictment. Because of the purported lack of detail, petitioners claimed that the government had been free, in violation of

the Fifth Amendment, to structure the actual charges presented at trial without regard to "whether the grand jury itself included a particular incident in the scheme on the same basis" (Appellants' C.A. Br. 23). The court of appeals rejected the argument and affirmed the convictions without opinion (Pet. App. 11a-13a).

2. Petitioners' contention (Pet. 8-13) involves only the application to the particular facts here of the principle that an indictment must be sufficiently specific to satisfy the Fifth Amendment requirement of grand jury accusation. No published decision is presented for review. The court of appeals' rejection of petitioners' contention is correct and does not conflict with any decision of this Court or of any other circuit. Review by this Court is therefore unwarranted.

a. The Court has long held that " 'an indictment is sufficient if it, first, contains the elements of the offense charged and[, second,] fairly informs the defendant of the charge against which he must defend, and, [third], enables him to plead an acquittal or conviction in bar of future prosecutions for the same offense.' " *United States* v. *Bailey*, 444 U.S. 394, 414 (1980) (quoting *Hamling* v. *United States*, 418 U.S. 87, 117 (1974)). See *Russell* v. *United States*, 369 U.S. 749, 763-764 (1962); *United States* v. *Debrow*, 346 U.S. 374, 376 (1953); *Hagner* v. *United States*, 285 U.S. 427, 431 (1932). The indictment in this case readily meets those standards.

First, the elements of the offenses were set out in the indictment. The elements of mail fraud (18 U.S.C. 1341) are "(1) a scheme to defraud[,] and (2) the mailing of a letter, etc., for the purpose of executing the scheme." *Pereira* v. *United States*, 347 U.S. 1, 8 (1954). The indictment describes the scheme petitioners employed to defraud insurance companies, among others, and Counts 1 through 43 specify—by date, sender, and recipient—the precise mailings made in furtherance of the scheme. Similarly, a

violation of 18 U.S.C. 2314 "requires (1) knowledge that certain property has been stolen or obtained by fraud, and (2) transporting it, or causing it to be transported, in interstate commerce" (*Pereira* v. *United States*, 347 U.S. at 9). Count 45 of the indictment[1] identifies certain property (an insurance company check) and its interstate transportation with precision, and it alleges that petitioners caused the transportation after having devised the scheme described earlier in the indictment and knowing the check was issued as a result of fraud.

Second, petitioners apparently do not dispute that the indictment fairly informed them of the charges against them. See Pet. 9 ("the issue is not notice"). In any event, by precisely identifying the mailings and checks at issue and alleging that the mailings and checks were part of an insurance scheme centering on fraudulent automobile-accident insurance claims, the indictment fairly apprised petitioners of what they " 'must be prepared to meet' " (*Russell* v. *United States*, 369 U.S. at 763-764 (citation omitted)). Indeed, each mailing and check transportation that petitioners were charged with having caused arose out of a particular alleged damage-producing incident involving petitioners and was related to a particular claim for insurance payments made by petitioners.

Third, petitioners do not contend that the indictment provided them insufficient protection against further prosecutions for the same offense. Nor could they so contend, given the indictment's identification of the specific mailings and checks, its description of the fraudulent scheme, and petitioners' right to rely on parts of the record other than the indictment itself in the event future proceedings are initiated against them. See *Russell* v.

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[1] Petitioners were acquitted on Count 44, the other count charging interstate transportation of property obtained by fraud.

United States, 369 U.S. at 764; *United States ex rel. Ballard* v. *Bengston*, 702 F.2d 656, 660 (7th Cir. 1983) ("An indictment need not plead offenses in such detail as to be self-sufficient as a bar against further prosecution for the same offense; it is the judgment that constitutes the bar.").

b. Petitioners nonetheless complain that the portion of the indictment describing the ten-year fraudulent insurance scheme was fatally unspecific. Starting with the fact that the indictment does not specify whether, for each particular accident, petitioners' fraud consisted in a staging of the accident or the inflating of asserted damages, petitioners argue that it is impossible to determine "(1) the specific incidents charged by the grand jury; or (2) the nature and character of the fraud residing in the specific incidents" (Pet. 6). This suggestion, however, mischaracterizes the nature of the charges made in the indictment. The "incidents charged by the grand jury" were the mailings and check transportations; and those were precisely defined. Each of those incidents was made criminal by virtue of an associated fraud, but the grand jury did not charge a series of 45 separate and unrelated frauds. Rather, it charged petitioners with a single, unified, and long-term scheme to defraud; and the indictment clearly defined the duration, objects, and operation of that scheme. Accordingly, when the government proved the details of the particular false representations petitioners made in the course of carrying out that single scheme, it in no way proved charges different from those the grand jury had in mind when it indicted petitioners.

In any event, petitioners' argument misunderstands the degree of specificity required in a case like this. Every indictment reflects a balance between specificity and conciseness, between reciting evidence and making allegations. It has long been established that an indictment should be "a plain, concise and definite written statement

of the essential facts constituting the offense charged" (Fed. R. Crim. P. 7(c)). See *Russell* v. *United States*, 369 U.S. at 762-763. Moreover, it is not the function of an indictment to set forth the evidence; a more thorough preview of the evidence is properly provided, if at all, through a bill of particulars, as was done in this case. See *United States* v. *Debrow*, 346 U.S. at 378 ("The sufficiency of the indictment is not a question of whether it could have been more definite and certain. If the defendants wanted more definite information * * * they could have obtained it by requesting a bill of particulars."); *Stokes* v. *United States*, 157 U.S. 187, 191 (1895) ("[t]he rules of criminal pleading do not require the indictment to set forth the evidence, or to negative every possible theory of the defence"); *United States* v. *Gordon*, 780 F.2d 1165, 1172 (5th Cir. 1986); *United States* v. *Buckley*, 689 F.2d 893, 897 (9th Cir. 1982), cert. denied, 460 U.S. 1086 (1983); *United States* v. *Freeman*, 619 F.2d 1112, 1118 (5th Cir. 1980), cert. denied, 450 U.S. 910 (1981).

The indictment in this case reasonably specified the allegations against petitioners without pleading evidence. It did not, as in *Russell*, "simply repeat the language of the criminal statute"; nor did it omit an allegation going to "the very core of criminality" (369 U.S. at 764). Rather, it described a large-scale fraudulent scheme and alleged that the scheme was executed in several different ways, leaving it to later stages in the prosecution to narrow and refine the allegations. This form of indictment is in accord with the provision of Fed. R. Crim. P. 7(c) that "[i]t may be alleged in a single count that the means by which the defendant committed the offense are unknown or that he committed it by one or more specified means." And contrary to petitioners' suggestion, the indictment is also wholly in line with this Court's decision in *United States* v. *Miller*, 471 U.S. 130 (1985), which rejected a Fifth Amendment challenge where the defendant was convicted

of a fraudulent scheme narrower and more limited than, but included within, the allegations of the indictment.

Contrary to petitioners' suggestion (Pet. 10-12), neither *Stirone* v. *United States,* 361 U.S. 212 (1960), nor *United States* v. *Radetsky,* 535 F.2d 556 (10th Cir.), cert. denied, 429 U.S. 820 (1976), supports petitioners' argument. In *Stirone,* the Court found (361 U.S. at 215-219) a Fifth Amendment violation because the conviction may have rested on a charge (that the defendant obstructed a Pennsylvania steel mill's export of steel outside Pennsylvania) that was not contained in and was different from the allegation of the indictment (that he obstructed the import of sand into Pennsylvania for the use of the steel mill). The proof in this case, by contrast, was merely a more refined version of what was alleged in the indictment. In *Radetsky,* the Tenth Circuit rejected a defendant's Fifth Amendment claim, finding that it was "not a case where the grand jury may have had a concept of the scheme essentially different from that relied on by the Government before the trial jury" (535 F.2d at 565). The same is true here.[2]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

CHARLES FRIED
Solicitor General

JANUARY 1988

[2] Petitioners also suggest (Pet. 10) that the Third Circuit does not recognize the Fifth Amendment guarantee that a defendant can be convicted of a felony only on charges brought by the grand jury. That contention is specious. See *United States* v. *Smith,* 789 F.2d 196, 200-201 (3d Cir. 1986), cert. denied, No. 86-100 (Dec. 15, 1986); *United States* v. *Castro,* 776 F.2d 1118, 1121-1125 (3d Cir. 1985), cert. denied, 475 U.S. 1029 (1986); *United States* v. *Schurr,* 775 F.2d 549, 553-559 (3d Cir. 1985).

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